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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner takes this opportunity to take issue with points raised in Respondent's Memorandum in Opposition. The alleged crime consisted of filing a joint return for Edward and Manuela McLean, married taxpayers, under power of attorney executed by Edward McLean alone. Petitioner filed two returns, the original 1968 joint return in May, 1969 and the amended 1968 joint return in January, 1971. Both returns were identical except that the amended return included the wife's tax information

previously omitted and, therefore, the amended return is the more correct return. Petitioner was indicted on both the original and amended returns. The district court dismissed the indictment as to the original. The jury convicted Petitioner on the amended return.

Petitioner's motion for new trial and judgment of acquittal (Pet. App. III, 2-13) pointed out that although Edward and Manuela McLean testified at trial that Mrs. McLean did not sign nor consent to the returns; in fact she gave her tacit consent thereto through her awareness of their existences and by participating in preparation thereof. Furthermore, Petitioner showed that Mrs. McLean always consented to sign the returns providing she receive the tax savings in advance from her husband but such condition must be ignored. (Pet. App. III, 8-9). Likewise, Petitioner pointed out that Government witnesses testified that he indicated to them that Mrs. McLean intended to sign the returns and, therefore, expressed her acquiescence thereto. (Pet. App. III, 18). Finally, Petitioner's motion for new trial avers that the grounds for new trial was a newly discovered formal consent to file joint returns including 1968 which was executed by both Edward and Manuela McLean and this agreement (1) directly contradicted their testimony at trial and (2) was relevant and material evidence that such consent was in fact given and should have been presented to the jury.

In response to these allegations, Respondent states that the revelation of this agreement between taxpayers which showed their testimony concerning Mrs. McLean's consent to be false is nevertheless immaterial in that an agreement executed subsequent to the act does not negate

an earlier fraud. *Willingham v. United States*, 289 F. 2d 283 (CA 5, 1961). (Resp., 4). This same reasoning was also propounded by the district court. *Willingham* is distinguishable from this case at bar. Taxpayer in *Willingham* in defense to his criminal fraud of taking false deductions showed that he incurred a net operating loss in a subsequent year which when carried back to the year in question eliminated taxable income and tax and, therefore, no crime had been committed. The Court of Appeals rejected this defense stating that the criminal intent or mens rea existed in the year the act was completed, and such intent is not negated by such a fortuitous event. An issue at trial in the case before us is whether or not Mrs. McLean gave her consent to the amended joint return. (Pet., 13). Government witnesses testified that Petitioner told them that she consented to the return and would sign it. (Pet. App. III, 20-22). The consent is further evidenced by the agreement. Execution of the agreement is not a fortuitous, unrelated event as in *Willingham* but goes directly to the very issue at trial, namely, consent. *Willingham* is further distinguished in that there is no allegation that taxpayer was convicted on false testimony.

Assuming arguendo, that Mrs. McLean did not consent but Petitioner believed she had consented or he otherwise had authority to file, the criminal intent is lacking and no crime has been committed. (Pet. App. III, 12-27). The agreement whereby she gave her formal consent to file returns for 1968 is crucial evidence to be presented to the jury on the question of Petitioner's state of mind. If direct evidence was presented that it was Petitioner's understanding that Mrs. McLean would sign the return and at the time this testimony was being presented before the

jury a formal agreement was executed by and between Mrs. McLean whereby she did agree to file joint returns; again this is not an unrelated fortuitous event. This agreement directly relates back and bears on Petitioner's state of mind or mens rea at the time of the alleged fraud.

Respondent argues that the McLeans had no right to file an amended joint return for 1968 since such return must be filed by April 15, 1972 and the agreement was executed more than one year after this date. (Resp. 4 fn. 3). In reply Petitioner points out that the amended 1968 return was filed on January 18, 1971 or three months prior to the deadline, and Petitioner asserts that Mrs. McLean gave her tacit consent thereto prior to the execution of the agreement. (Pet. App. III, 1-12). The newly discovered agreement is further evidence that tacit consent was given by Mrs. McLean at the outset, and that Petitioner was correct when he stated to Government witnesses that Mrs. McLean intended to sign the return and thus consented thereto.

Subsequent to this agreement Petitioner learned that an identical 1968 return with Mrs. McLean's signature attached thereto was filed before the Internal Revenue Service, further evidence that Mrs. McLean intended from the outset to file jointly. A copy of Petitioner's motion to produce this evidence is appended to this Reply.

Respondent also takes issue with Petitioner's assertion that the district court's conclusion of immaterially was based on an error of law, namely, that Petitioner knew at the time of filing that the McLeans were estranged and not entitled to file a joint return. (Resp., 3). In support for this contention Respondent relies on information from

the transcript. Petitioner reiterates that the error appears in the Order of the district court and is the ground for ruling that the new evidence is immaterial; that the words in the Order are clear and unequivocal; and that if such legal premises were correct the district court's conclusion predicated upon this premise would be correct. (Pet. App. IV). The district court's Order also makes a finding as to Petitioner's state of mind at the time of the act, but no evidence was proffered at trial to show that Petitioner was aware that the McLeans were not eligible to file jointly because they were estranged.

Respondent alleges that the Order says that ". . . if the intended use of the so called newly discovered evidence was to establish that Mrs. McLean had consented to the joint return prepared and presented by Petitioner, the evidence at trial was contrary to this conclusion." (Resp., 5). Respondent admits that the district court found that the agreement was immaterial because there was other evidence to sustain the verdict. However, the trial judge is not the proper person to make this determination. The role of the jury is to assume this responsibility, but the jury at this juncture can no longer act and a new trial must be ordered. *Mesarosh v. United States*, 77 S. Ct. 1 (1956).

Respondent then concludes by admitting that if the McLeans lied at trial on the crucial issue of Mrs. McLean's consent, Petitioner would be entitled to a new trial. However, Respondent finds that Mrs. McLean's testimony was truthful because the district court found that the subsequent agreement could not have affected the falsity of the return prepared by Petitioner. (Resp., 5). The logic of this reasoning is wanting. It is incredible to

believe that lies by witnesses under oath at trial are negated on the ground that the new evidence (agreement), which reveals the falsity of the testimony, is immaterial because the agreement was executed two years after the alleged fraudulent return was prepared. The issue before this Court is not whether the agreement validates the 1968 amended return. This is a civil question. The criminal issue is whether or not Mrs. McLean gave her tacit consent to the return and whether or not Petitioner believed he had authority to prepare and file it. Mr. and Mrs. McLean testified at trial that Mrs. McLean never agreed to terms under which they would file jointly. (Transcript 34, 68). The jury then had reason to believe that at no time did they agree to file joint returns. The agreement is in direct contradiction to this testimony and reasonable men could believe such testimony to be false.

The conclusion that an agreement executed more than two years after the return was filed cures false testimony is totally illogical. Is testimony determined to be true or false upon the happening or chance of an event or in this case when the agreement occurred? If the agreement were executed only a year or perhaps six months after filing the return then is Petitioner entitled to a new trial because the shorter time period now shows the testimony to be false? This is what Respondent suggests in his Memorandum. However, this Court rightfully holds that if the false testimony is in any way relevant to the case or could in any reasonable likelihood have affected the judgment of the jury the appeals court has the duty to correct the falsity and order a new trial, *Napue v. Illinois*, 78 S.Ct. 1173 (1958). *Giglio v. United States*, 92 S. Ct. 763 (1972). Therefore, since the new evidence reveals that false

testimony was given at trial, such new evidence is not merely impeaching.

For reasons herein stated and previously stated in the petition for a writ of certiorari, this Court should grant certiorari.

Respectfully submitted,

William J. Beiswanger
Attorney for Petitioner
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P.O. Box 746 (832-6357)
Palm Beach, Florida 33480

PROOF OF SERVICE — AFFIDAVIT

I, WILLIAM J. BEISWANGER, attorney of record for Paul C. Washburn, Petitioner, herein depose and say that I served by mail three copies of Petitioner's Reply to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Respondent herein.

/s/ WILLIAM J. BEISWANGER
William J. Beiswanger
Attorney for Petitioner
104 North County Road
P.O. Box 746 (832-6357)
Palm Beach, Florida 33480

SWORN to and subscribed before me this 27 day of December.

/s/ CARL M. COLLIER
NOTARY PUBLIC,
State of Florida at Large

My Commission Expires:
May 5, 1978
(SEAL)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

versus No. 73-143-CR-CF

PAUL C. WASHBURN,
Defendant.

MOTION FOR PRODUCTION OF DOCUMENTS

1. Defendant, PAUL C. WASHBURN, hereby asks this Court, pursuant to Rule 16, Federal Rules of Criminal Procedure, to permit Defendant to inspect and copy all joint income tax returns filed with the Internal Revenue Service and signed by both Edward B. McLean and Manuela H. McLean, electing the filing status of married filing jointly, for all years beginning with and including 1968, 1969, 1970, 1971, 1972, 1973.

2. These documents pertain to the following matter.

(a) Defendant, Paul C. Washburn, was indicated and convicted of violating 26 USC 7206(2) in that he allegedly prepared an amended joint income tax return for the year 1968 for Edward B. McLean and Manuela H. McLean, electing the status of married, filing jointly, under power of attorney executed by Edward B. McLean alone.

(b) Since Mrs. McLean did not sign either the return nor a power of attorney the issue was whether or not Mrs. McLean gave her consent to this return. Transcript of Testimony, page 393.

(c) Both Mr. McLean and Mrs. McLean testified at trial that she did not consent to this return. Transcript of Testimony, pages 34, 67, 69, 70, 75.

(d) The case was appealed to and affirmed by the Court of Appeals. *United States v. Paul C. Washburn* (CA5, 1973) 488 F.2d. 132.

(e) Defendant filed a Motion for New Trial and Judgment of Acquittal on the grounds of newly discovered evidence. The newly discovered evidence consisted of an agreement between Mr. and Mrs. McLean to file joint income tax returns for all open years, including the year 1968. Since this agreement was executed at the time Mr. and Mrs. McLean testified that she had not given her consent, Defendant alleged that their testimony misled the jury. The new evidence was so material that it would have probably produced a different verdict if presented to them.

(f) This Court denied Petitioner's motion of February 14, 1974, and the Court of Appeals affirmed on August 20, 1974.

(g) It has now come to the attention of Defendant that, in addition to the agreement to file jointly, both Mr. and Mrs. McLean have signed and filed joint income tax returns for 1968 and subsequent years.

(h) Defendant alleges that this is new and material evidence which goes directly to the question of consent of Mrs. McLean; that if, in addition to the agreement to file jointly, these returns were presented to a jury in all likelihood the jury would reach a different verdict.

3. These documents are not otherwise procurable by Defendant in that they were voluntarily given by Mr. and Mrs. McLean to the Internal Revenue Service subsequent to trial, and are not available to others.

4. Defendant can not properly prepare his Motion for New Trial without this new evidence.

5. This application is made in good faith and is not an attempt to obtain information generally.

6. Authority for Defendant's motion lies in the decisions of the United States Supreme Court and in the Court of Appeals for the Second Circuit. The Constitutional basis for disclosure lies in the right to a fair trial by due process under the Fifth and Fourteenth Amendments. Defendant has the right to be protected against the suppression of exculpatory evidence even in absence of demand to or bad faith on part of the prosecutor. Disclosure of all material under Rule 16, Federal Rules of Criminal Procedure promotes the proper administrator of justice. *Napue v. Illinois*, 79 S.Ct. 1193 (1958); *United States v. Keogh*, 391 F.2d. 146 (C.A.2); *Brady v. Maryland*, 83 S.Ct. 1194 (1963); *Dennis v. United States*, 86 S.Ct. 1840 (1966).

WHEREFORE, in consideration of the premises, Defendant requests this Court to order Plaintiff to produce and deliver to Defendant those documents requested in this motion.

/s/ WILLIAM J. BEISWANGER
WILLIAM J. BEISWANGER
Attorney for Defendant
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished by mail to Max Wheeler, Attorney, Tax Division, Department of Justice, Washington, D.C. 20530 this 12th day of September, 1974.

/s/ WILLIAM J. BEISWANGER
WILLIAM J. BEISWANGER
Attorney for Defendant
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